87 588

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PEABODY COAL COMPANY,
Appellant,

vs.

THE STATE TAX COMMISSION OF MISSOURI,
CHARLES SCHNEIDER, and GEORGE LEACHMAN,
Appellees.

On Appeal From the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether business and corporate aircraft used as instrumentalities of interstate commerce are subject to the same requirement of apportionment for ad valorem taxation as commercial aircraft owned and operated by regularly scheduled common carriers under the Due Process Clause of the United States Constitution?

PARTIES BELOW

Peabody Coal Company is a wholly-owned subsidiary of Peabody Holding Company, Inc. Peabody Holding Company, Inc. is owned by Newmont Mining Corporation, Bechtel Investments, Inc., The Boeing Company, Eastern Gas and Fuel Associates (a Massachusetts business trust) and The Equitable Life Assurance Society of the United States.

The State Tax Commission of Missouri is an agency of the State of Missouri. Charles Schneider is the Assessor of St. Louis County, Missouri. George Leachman is the Collector of Revenue for St. Louis County, Missouri.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties Below	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Consitutional and Statutory Provisions	2
Statement of the Case	3
Substantiality of Question Presented	6
Conclusion	11
Appendix:	
A. Opinion of the Supreme Court of Missouri (rendered June 16, 1987)	A-1
B. Order of the Supreme Court of Missouri denying Appellant's Motion for Rehearing (entered July 14, 1987)	A-7
C. Memorandum Opinion and Order of the Circuit Court of the City of St. Louis, Missouri (rendered September 22, 1986)	A-8
D. Decision and Order of the Missouri State Tax Commission (rendered March 21, 1985)	A-11
E. Notice of Appeal to the Supreme Court of the United States (filed September 3, 1987)	A-27

TABLE OF AUTHORITIES

Page

Cases:

American Refrigeration Transit Co. v. Hall, 174 U.S. 70 (1899) 8

Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590 (1954) 6,7,8,10

Central Railroad Co. v. Pennsylvania, 370 U.S. 607 (1962) 7,8

Northwest Airlines v. Minnesota, 322 U.S. 292 (1944) .. 7,8

Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949) 9

Pullman Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891) 8,9

Other Authorities:

Mo. Rev. Stat. § 137.075 (1986) 2

Mo. Rev. Stat. § 137.095 (1986) 3

U.S. Const. art. I, § 8, c.l. 3 5

U.S. Const. amend. XIV, § 1 ..... *passim*

28 U.S.C. § 1257(2) 2

Aircraft Industry Association of America, AIRCRAFT YEARBOOK 244 (1954, 36th Ann. Ed.) 6

Aerospace Industry Association of America, Inc., AEROSPACE FACTS AND FIGURES 101 (1985-86) 6

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PEABODY COAL COMPANY,
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vs.

THE STATE TAX COMMISSION OF MISSOURI,
CHARLES SCHNEIDER, and GEORGE LEACHMAN,
Appellees.

On Appeal From the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

Peabody Coal Company appeals from the judgment of the Supreme Court of Missouri, dated June 16, 1987, holding that the imposition of ad valorem taxes on the full assessed valuation, without apportionment, of business aircraft used in interstate commerce did not violate the Due Process Clause of the United States Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri, which appears in the appendix hereto, p. A-1, *infra,* is reported at 731 S.W.2d 837 (Mo. banc 1987). The Order denying Appellant's Motion for Rehearing on July 14, 1987 appears in the appendix at p. A-7, *infra.*

The Memorandum Opinion and Order of the Circuit Court of the City of St. Louis, dated September 22, 1986 is not reported. It is reprinted in the appendix hereto, p. A-8, *infra*.

The Decision and Order of the State Tax Commission of Missouri, dated March 21, 1985, are not reported. They are reprinted in the appendix hereto, p. A-11, *infra*.

JURISDICTION

The judgment of the Supreme Court of Missouri, upholding the decision of the State Tax Commission of Missouri imposing ad valorem taxes on the full assessed valuation of appellant's aircraft, without apportionment, was rendered on June 16, 1987. See appendix, p. A-1, *infra*. A Motion for Rehearing was filed and denied on July 14, 1987. See appendix, p. A-7, *infra*.

A notice of appeal to this Court was filed in the Supreme Court of Missouri on September 3, 1987. See appendix, p. A-27, *infra*.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

No state . . . shall deprive any person of life, liberty, or property, without due process of law; . . .

• • • •

Mo. Rev. Stat. § 137.075 (1986):

What property liable for taxes. Every person owning or holding real property or tangible personal property on the first day of January, including all such property purchased on that

day, shall be liable for taxes thereon during the same calendar year.

• • • •

Mo. Rev. Stat. § 137.095 (1986):

Corporate property, where taxed. The real and tangible personal property of all corporations operating in any county in the state of Missouri and in the city of St. Louis, and subject to assessment by county or township assessors, shall be assessed and taxed in the county in which the property is situated on the first day of January of the year for which the taxes are assessed, and every general or business corporation having or owning tangible personal property on the first day of January in each year, which is situated in any other county than the one in which the corporation is located, shall make return to the assessor of the county or township where the property is situated, in the same manner as other tangible personal property is required by law to be returned.

STATEMENT OF THE CASE

Appellant Peabody Coal Company is a Delaware corporation which had its principal place of business in the City of St. Louis, Missouri during the period in question. Appellees are the State Tax Commission, the St. Louis County Assessor, and the St. Louis County Collector of Revenue.

During 1982 and on January 1, 1983, Peabody was the owner or lessor of two aircraft - N 306 PC (a Rockwell Sabreliner) and N 302 PC (a Beechcraft King Air). The aircraft were hangared in St. Louis County when they were in the St. Louis area.

Peabody is principally engaged in the operation of underground and surface coal mines throughout the United States. The two aircraft were used exclusively in conducting the interstate business of Peabody by transporting company personnel and cargo to various destinations throughout the United States. The aircraft did not transport either passengers or cargo for hire as a common carrier.

This case was submitted at all levels below upon a Joint Stipulation of Facts. The parties stipulated to the facts evidencing the contacts of the aircraft with Missouri and other states including Indiana, Kentucky, Illinois, Ohio, West Virginia, Colorado, Florida, Arizona and the District of Columbia. Peabody contended that the contacts with the State of Indiana (summarized in Table 1) established that the aircraft acquired a tax situs in at least that state in addition to Missouri, which required apportionment of personal property taxes under the Due Process Clause.

Table 1

Aircraft N 306 PC (Rockwell Sabreliner)

Nature	Total	In Mo	% Mo	Non-Mo	% Non-Mo	In Ind	% Ind
Landings	329	146	44.4%	183	55.6%	63	19.1%
Flight Time (hours)	440:29	72:27	16.4%	368:02	83.6%	NA[1]	NA
Flight Miles	181,904	22,190	12.2%	159,714	87.8%	NA	NA
Ground Time (hours)	8,760	6,581	75.1%	2,179	24.9%	129	1.4%

Aircraft N 302 PC (Beechcraft King Air)

Nature	Total	In Mo	% Mo	Non-Mo	% Non-Mo	In Ind	% Ind
Landings	508	199	39.2%	309	60.8%	162	31.8%
Flight Time (hours)	535:12	140:11	26.2%	395:01	73.8%	NA	NA
Flight Miles	133,841	13,679	10.2%	120,162	89.8%	NA	NA
Ground Time (hours)	8,760	6,461	73.7%	2,299	26.3%	363	4.1%

[1] NA = Not Available

Peabody filed its St. Louis County personal property declaration on February 28, 1983. The St. Louis County Assessor determined that the two Peabody aircraft were taxable at their full assessed valuation without apportionment. Peabody appealed the Assessor's determination to the Board of Equaliza-

tion of St. Louis County. In that appeal, Peabody raised the claim that under the Commerce Clause of the United States Constitution personal property tax could be imposed on its aircraft only on an apportioned basis because the aircraft were instrumentalities of interstate commerce. The Board of Equalization affirmed the Assessor's determination that the aircraft were taxable in St. Louis County at their full assessed valuation.

Peabody appealed the decision of the Board of Equalization to the State Tax Commission of Missouri and paid the tax under protest. Peabody contended before the State Tax Commission that personal property taxes on the aircraft must be apportioned under both the Commerce and the Due Process Clauses of the United States Constitution. The State Tax Commission expressly rejected both federal constitutional claims, holding that (1) the Commerce Clause of the United States Constitution did not require the apportionment of the ad valorem taxation of the aircraft because the aircraft were not instrumentalities of interstate commerce in that they were privately-owned transportation vehicles; and (2) the Due Process Clause did not require apportionment because the aircraft were never in any other state with sufficient regularity to acquire a taxable situs outside of Missouri.

Peabody appealed the decision of the State Tax Commission to the Circuit Court of the City of St. Louis. The Circuit Court reversed the Commission's finding that the aircraft were not instrumentalities of interstate commerce. However, it affirmed the Commission's finding that the aircraft's only taxable situs was St. Louis County because they spent approximately 75% of their ground time there. The Circuit Court upheld the decision of the Commission that the aircraft did not have an alternative tax situs in Indiana (the state visited next most often to Missouri) because they spent only 4.1% and 1.4% of their ground time there. Accordingly, the Circuit Court concluded that the Commission could reasonably find that the aircraft were not habitually employed in Indiana or any state other than Missouri in 1982.

Peabody appealed the judgment of the Circuit Court to the Supreme Court of Missouri. The Missouri Supreme Court, en banc, affirmed the decision of the Circuit Court, concluding that the taxing authorities could properly find that the aircraft were situated in St. Louis County so as to be subject to taxation on the full assessed valuation without apportionment. The court ruled that the aircraft did not acquire a tax situs in Indiana because they did not enter that state on a "regularly scheduled basis." The court held, in effect, that only aircraft which entered another state on a regularly scheduled basis were "habitually employed" in that state regardless of the number, nature or duration of the aircraft's contacts with the non-domiciliary state. The court further held that private aircraft, as distinguished from commercial aircraft operated by common carriers, must establish a "continuous presence" in a non-domiciliary state in order to acquire a tax situs. Accordingly, the Missouri Supreme Court expressly rejected Peabody's Due Process claim.

SUBSTANTIALITY OF QUESTIONS PRESENTED

The question presented by this appeal is whether business aircraft which are instrumentalities of interstate commerce should be subject to the same requirement of apportionment for personal property taxation as commercial aircraft owned and operated by regularly scheduled common carriers. Since the Court's last decision on the apportionment of taxes on aircraft nearly thirty-five years ago, *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment,* 347 U.S. 590 (1954), there has been a dramatic increase in the number of aircraft used by businesses in interstate commerce. In 1953, there were 21,500 aircraft in the business fleet. Aircraft Industry Association of America, AIRCRAFT YEARBOOK 244 (1954, 36th Ann. Ed.). By 1983, the number of business and executive aircraft nearly tripled to 62,089. Aerospace Industry Association of America, Inc., AEROSPACE FACTS AND FIGURES 101 (1985-86). The Court's prior decisions in this area have all

dealt with aircraft or other movable property used by common carriers. The Court has never considered the applicability of the Due Process Clause to property regularly used in interstate commerce by a business which is not a common carrier. A decision on this question would have general application to business aircraft owned by thousands of taxpayers in every state.

The Court has held that a state may tax personal property used by common carriers as instrumentalities of interstate commerce without apportionment, only if the property has not acquired a tax situs in another state. *Central Railroad Co. v. Pennsylvania,* 370 U.S. 607 (1962). As long as another state could possibly assert jurisdiction to tax, the domiciliary state is precluded from taxing the property without apportionment. *Id.* at 614.

In *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment,* 347 U.S. 590 (1954), the Court held that Due Process was satisfied, at least with respect to commercial aircraft, if the aircraft were habitually employed within the state. The Court recognized that "the [tax] situs issue devolves into the question of whether eighteen stops per day by appellant's aircraft is sufficient contact with Nebraska to sustain that state's power to levy an apportioned ad valorem tax on such aircraft." *Id.* at 600-601.

Although *Braniff* appears to establish a standard for the acquisition of tax situs with respect to all aircraft used in interstate commerce, regardless of whether they are operated by a common carrier, the court below failed to apply that test to Peabody's aircraft. The court said that cases "involv[ing] regularly scheduled common carriers . . . do not provide substantial guidance" for the resolution of a case involving business aircraft. App. A, at p. . Thus, the court concluded that the *Braniff* standard was inapplicable and that a "continuous presence" standard announced by this Court in the earlier case of *Northwest Airlines v. Minnesota,* 322 U.S. 292 (1944) should be applied. App. A, at p.

Braniff nowhere purports to be restricted to common carriers or to operators of aircraft on fixed, regular routes. The basis upon which the *Braniff* court held that a non-domiciliary state could tax certain aircraft was their contacts with the state as evidenced by the number and proportion of landings in the non-domiciliary state compared to their total landings in all states. *Braniff,* 347 U.S. at 600-601. There was no requirement that an aircraft be operated by a regularly scheduled common carrier for the imposition of an apportioned tax.

The Missouri Supreme Court's statement that there must be a "continuous presence" in a non-domiciliary state to acquire a tax situs in such state, is contrary to this Court's opinion in *Braniff.* In *Braniff,* the Court approved taxation of the entire fleet by the non-domiciliary state of Nebraska "even though *none of the aircraft is continually within the state.*" *Braniff* at 601. (emphasis added). Although *dicta* in *Northwest Airlines* offers some support for the application of a "continuous presence" standard, after the *Braniff* decision *Northwest* appears to be the exception and not the rule. *Braniff* distinguished *Northwest* on the grounds that the taxpayer had not shown, as a matter of proof, that a part of its fleet had acquired a tax situs in another state. 347 U.S. at 602.

Moreover, "daily scheduling" is not required to demonstrate the existence of a tax situs under the Due Process Clause. The Court has long recognized that a non-domiciliary state may tax movable personal property which has sufficient contacts with that state even though those contacts occur on neither a regular schedule nor fixed and regular routes. *American Refrigeration Transit Co. v. Hall,* 174 U.S. 70 (1899); *Central Railroad Co. v. Pennsylvania,* 370 U.S. 607 (1952).

In *Pullman Palace Car Co. v. Pennsylvania,* 141 U.S. 18 (1891), the Court sustained a tax by a non-domiciliary state on railroad cars which were regularly employed within the state on fixed and regular routes. *American Refrigeration Transit Co. v.*

Hall, 174 U.S. 70 (1899) extended the *Pullman* principle to the taxation of a non-domiciliary taxpayer whose cars did not move on fixed and regular routes, let alone on a daily schedule. Many years later, the Court affirmed the principle that the following of "prescribed routes and schedules" is not the only basis for taxation, stating:

> Habitual employment within the State of a substantial number of cars, albeit on irregular routes, may constitute sufficient contact to establish a tax situs.

370 U.S. at 615.

The underlying rationale for requiring apportionment under the Due Process Clause illustrates why a distinction between commercial and private aircraft for purposes of personal property taxation is illogical. As the Court stated in *Ott v. Mississippi Valley Barge Line Co.,* 336 U.S. 169 (1949), "so far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state." *Id.* at 174. In this regard, it can hardly be said that a state offers any less protection to private business aircraft during landings and stops than to commercial aircraft operated by common carriers. In making recurrent landings in a state, private business aircraft make repeated demands for the protection of states and take repeated advantage of benefits and opportunities afforded by the state. Private business aircraft place identical demands, on police, fire and emergency services in states in which they land as commercially operated aircraft. Moreover, states incur the same noise pollution and risk of air traffic collisions and mishaps with respect to privately operated business aircraft as commercial aircraft. Thus, the minimal Due Process standards for tax situs in a state should apply equally as well to private business aircraft as to commercial aircraft operated by common carriers.

The Court should give plenary consideration to this appeal to remove the uncertainty that will result from the decision below

for those businesses that utilize private aircraft in conducting interstate business. Increasingly, businesses have obtained and operated their own aircraft to decrease reliance on inconvenient and unreliable commercial airline schedules. Although airlines provide service to all states, businesses frequently desire to operate their own aircraft to escape the restrictions of fixed schedules or to travel to areas which are not served by commercial airlines. Imposing a requirement of daily schedules on private business aircraft used in interstate commerce to qualify for apportionment of property taxes, however, defeats the purpose for having such aircraft in the first place. On the one hand, the establishment of a fixed daily schedule will unduly hamper business operations. On the other hand, however, the failure to impose such schedules would subject businesses to the risk of inconsistent or multiple taxation on the aircraft.

There is no logical reason for distinguishing between aircraft operated in interstate commerce by common carriers and private businesses. The same standard should be applied in determining whether a private aircraft acquires a tax situs in a non-domiciliary state when that aircraft is habitually employed in the state. In *Braniff,* the Court held that even though the aircraft made only 9% of their total annual landings in Nebraska, such contact was sufficient to constitute a tax situs for the entire fleet. *Id.* at 600-601. Measured by this standard, Peabody's aircraft had far more contacts with Indiana than Braniff had with Nebraska. The Sabreliner landed in Indiana 63 times in 1982, or 19.1% of all of its landings in the entire year. The King Air landed in Indiana 162 times in 1982, or 31.8% of all of its landings.

Proportionally, Peabody's landing rate in Indiana is three times that of Braniff's landing rate in Nebraska. While the Court need not decide how few landings are enough to satisfy Due Process, surely 225 landings per year, 26.9% of the aircraft's total annual landings, is sufficient to establish a tax situs in Indiana.

The Missouri Supreme Court, however, has applied an inconsistent and incorrect standard in light of this Court's prior opinions on the apportionment of taxation of movable personal property. In order to resolve the uncertainty that the Missouri Supreme Court decision has created, the Court should note probable jurisdiction of this appeal to clarify the circumstances in which the taxation of private business aircraft engaged in interstate commerce must be apportioned under the Due Process Clause.

CONCLUSION

For the foregoing reasons, Appellant Peabody Coal Company respectfully requests the Court to note probable jurisdiction of this appeal.

Respectfully submitted,

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Dated: October 9, 1987

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APPENDIX

BEST AVAILABLE COPY

APPENDIX A

Supreme Court Of Missouri,
En Banc

Peabody Coal Company,
Plaintiff-Appellant,

v.

State Tax Commission of Missouri, et al.,
Defendants-Respondents.

No. 68858

June 16, 1987

Rehearing Denied July 14, 1987

BLACKMAR, Judge.

The appellant taxpayer is a Delaware corporation with its principal office and place of business in the City of St. Louis. It operates coal mines in numerous states. It owns two aircraft which are used in the course of its business to transport persons and property to and from its several installations, and elsewhere as the needs of its business require. The aircraft, when in the St. Louis area, are hangared in St. Louis County and spend approximately 75% of their ground time there. The taxing authorities of St. Louis County have sought to impose ad valorem taxes on the full assessed valuation of both aircraft.

The taxpayer paid the taxes under protest and has processed statutory appeals to the State Tax Commission, asserting that the aircraft have a taxable situs in Indiana as well as in Missouri, and that Missouri, under the commerce clause of the United States Constitution (art. I, § 8, cl. 3) and the due process clause of the Fourteenth Amendment, may not tax the aircraft at their full value. The Commission upheld the assessment on the basis of stipulated facts, as did the Circuit Court of the City of St. Louis. We affirm the judgment of the circuit court, concluding

that the taxing authorities could properly find that the aircraft were "situated" in St. Louis County within the meaning of § 137.095, RSMo 1978, which reads as follows:

> 1. The real and tangible personal property of all corporations operating in any county in the state ... and subject to assessment by county or township assessors, shall be assessed and taxed in the county in which the property is situated....

In *Buchananan County v. State Tax Commission*, 407 S.W.2d 910, 914 (Mo.1966) we held that the word "situated" in the above-cited statute "refers to the place where the personal property is regularly kept ... with a more or less permanent location." (Citations omitted).

The taxpayer argues that the aircraft have acquired a taxable situs in Indiana, by reason of their frequent landings there. (One aircraft made 19.1% of its landings there and the other 31.8%). It relies heavily on *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967 (1954), holding that the State of Nebraska could levy an apportioned ad valorem tax on the fleet of an interstate air carrier which operated daily scheduled flights to and from points in Nebraska. It also emphasizes the holding in *Central Railroad Co. v. Pennsylvania*, 370 U.S. 607, 82 S.Ct. 1297, 8 L.Ed.2d 720 (1962), in which freight cars owned by a railroad were present substantially all the time in a nondomiciliary state under a contractual arrangement with the taxpayer's parent corporation, and were used on fixed routes and regular schedules. Both cases involve regularly scheduled common carriers, and do not provide substantial guidance for the resolution of this case. The parties have found no cases about any requirement of apportionment of ad valorem taxation of aircraft not operated by a common carrier, and we have located none.

The taxpayer amplifies its argument by asserting that Indiana, and possibly other states, could assert an apportioned ad

valorem tax against these aircraft. It properly suggests that it makes no difference whether any other state has tried to subject the aircraft to ad valorem taxation, citing *Central Railroad, supra,* at 614, 82 S.Ct. at 1303. The existence in another state of the constitutional authority to do so is enough to preclude Missouri from levying an unapportioned ad valorem tax.

The taxpayer's arguments are perhaps more appropriately grounded upon the due process clause than upon the commerce clause. *Braniff,* 347 U.S. at 599, 74 S.Ct. at 762-63. It may be conceded that the transportation of persons and property from Missouri to Indiana for business purposes is interstate commerce. Ad valorem taxation of instrumentalities of commerce, however, does not burden that commerce. The books are full of cases holding that interstate commerce may be required to pay its own way, in exchange for protection and service furnished by state and local governments.[1] A due process problem is presented if a state tries to tax property outside its borders, or if several states try to tax the same property without apportionment. *Union Refrigerator Transit Co. v. Kentucky,* 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150 (1905).

Personal property, by its nature, is movable. The term, "movables" is, indeed, a synonym. But it has never been considered that apportionment is required simply because an item

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[1] *Ott v. Mississippi Valley Barge Line Co.,* 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585, *reh. denied* 336 U.S. 928, 69 S.Ct. 653, 93 L.Ed. 1089 (1949); *Johnson Oil Refining Co. v. Oklahoma,* 290 U.S. 158, 54 S.Ct. 152, 78 L.Ed. 238 (1933); *Union Refrigerator Transit Co. v. Kentucky,* 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150 (1905); *American Refrigerator Transit Co. v. Hall,* 174 U.S. 70, 19 S.Ct. 599, 43 L.Ed. 899 (1899); *Zantop Air Transport, Inc. v. County of San Bernardino,* 246 Cal.App.2d 433, 54 Cal.Rptr. 813 (1966); *Union Barge Line Corp. v. Marcum,* 360 S.W.2d 130 (Ky.1962); *Jack Cole Co. v. Ellington,* 52 Tenn. App. 120, 372 S.W.2d 204 (1961). *See generally, Situs of Aircraft, Rolling Stock, and Vessels for Purposes of Property Taxation,* 3 A.L.R.4th 837 (1981).

of personal property is not always in the same place. In *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 295, 64 S.Ct. 950, 952, 88 L.Ed. 1283 (1944), the Supreme Court allowed ad valorem taxation of full face value of a fleet of airplanes by the state of its domicile and principal place of business, placing the burden on the taxpayer to demonstrate that some other jurisdiction had the power to tax the aircraft. Contrary to the taxpayer's assertion, *Braniff* did not overrule *Northwest*, but simply delineated a fact situation in which the taxpayer could make the required showing of multiple taxing authority. *Braniff*, 347 U.S. at 601-602, 74 S.Ct. at 764-65. *Central Railroad* reaffirmed the general proposition. 370 U.S. at 613-614, 82 S.Ct. at 1302. Here, for all the stipulation shows, the taxpayer used the two planes for travel to Indiana and other states without any regularity and solely in accordance with the requirements of its business. There is neither the daily scheduling of *Braniff* nor the habitual employment of *Central Railroad*. Property does not become subject to multiple taxation simply because it is often taken across a state line. *Central Railroad, supra*, provides more support for the state than for the taxpayer, by allowing unapportioned taxation of most of the classes of railroad car discussed.

To acquire an "actual situs" in another state so as to limit the exclusive taxing authority of the home state, there must be "continuous presence in another state which thereby supplants the home state and acquires the taxing power over personalty that has become a permanent part of the foreign state." *Northwest Airlines*, 322 U.S. at 296, 64 S.Ct. at 952-53. Peabody has not met its burden of showing a continuous presence or "actual situs" in Indiana.

Missouri makes the incident of operating in the state the occasion for levying personal property taxes on such of a corporation's property as is situated in the state. The Tax Commission properly concluded that the taxpayer's two aircraft were situated in St. Louis County. The taxpayer has failed to

establish that their irregular presence in Indiana was sufficient to justify that state in levying personal property taxes.

Inasmuch as we conclude that the property may be taxed at its full assessed valuation, we have no occasion to decide whether statutory authority is necessary to assess an apportioned tax, in cases in which apportionment is constitutionally required.

The judgment is affirmed.

HIGGINS, C.J., and BILLINGS, DONNELLY, ROBERTSON and RENDLEN, JJ., concur.

WELLIVER, J., dissents in separate opinion filed.

WELLIVER, Judge, dissenting.

I respectfully dissent. In my opinion, the stipulated facts establish that the airplanes have a taxable situs in Indiana as well as in Missouri and that under the commerce clause of the United States Constitution, Art. I, § 8, cl. 3, and the due process clause of the Fourteenth Amendment, Missouri cannot tax them at their full value. *Braniff Airway, Inc. v. Nebraska State Board of Equalization and Assessment,* 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967 (1954).[1]

> The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. *See Union Refrigerator Transit Co. v. Kentucky,* 199 U.S. 194, 50 L.Ed. 150, 26 S.Ct. 36, 4 Ann.Cas. 493. Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations.

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[1] These are commercial aircraft, even though they are not operated on daily scheduled flights.

Standard Oil Co. v. Peck, 342 U.S. 382, 384-85, 72 S.Ct. 309, 310, 96 L.Ed. 427 (1952). I suggest that the principal opinion will trigger a migration of business aircraft utilized in interstate commerce from Missouri airports to airports across state lines, particularly in our two major metropolitan areas, and possibly in St. Joseph, Joplin-Carthage, Cape Girardeau, Hannibal, and other areas. If the aircraft go, with them will go sales, fuel, repair and maintenance and the jobs and taxes related thereto.

The case should be remanded with directions to apportion Missouri's share of the taxable value of the aircraft. I believe that the appropriate standard of apportionment would be that used for common carriers.

APPENDIX B

CLERK OF THE SUPREME COURT
STATE OF MISSOURI

Post Office Box 150
Jefferson City, Missouri
65102

Thomas F. Simon
Clerk

July 14, 1987

Telephone
(314) 751-4144

Mr. Donald J. Stohr
Mr. James W. Erwin
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St. Louis, Missouri 63101

Re: Peabody Coal Company vs. State Tax Commission of Missouri, et al., No. 68858

Gentlemen:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Appellant's motion for rehearing overruled."

Very truly yours,

/s/ Thomas F. Simon
Clerk

cc: Ms. Paula J. Lemerman

APPENDIX C

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT

(St. Louis City)

Peabody Coal Company,

Plaintiff,

vs.

The State Tax Commission Of Missouri,

Charles Schneider, Assessor for the
County of St. Louis, Missouri,

and

George Leachman, Collector of Revenue
for the County of St. Louis,

Defendants.

Cause No. 854-00098

Filed September 22, 1986

MEMORANDUM OPINION AND ORDER

This cause was duly heard on August 8, 1986, the parties appearing by counsel. The Court being fully advised in the premises and having considered the pleadings, evidence and memoranda of law submitted, affirms the judgment of the State Tax Commission.

The plaintiff herein is the owner or lessee of two aircraft used by it and its affiliates in the conduct of their interstate business. Plaintiff has appealed from the decision of the State Tax Commission that the Assessor for St. Louis County can assess ad valorem taxes with respect to the aircraft for the year 1982. This appeal was brought pursuant to Sections 138.430 and 536.100, RSMo.

The scope of review of this case is set out in Section 536.140 RSMo. Plaintiff alleges generally that the determination of the Commission is unsupported by competent and substantial evidence upon the whole record, is arbitrary, capricious and unreasonable, is unauthorized by law, and involves an abuse of discretion.

The first finding of the Commission attacked by plaintiff is the finding that the aircraft are not instrumentalities of interstate commerce, and that as a result no apportionment is necessary to satisfy requirements of the due process and commerce clauses of the United States Constitution. This finding of the Commission is contrary to law and not supported by the evidence. Where corporate aircraft are used for interstate travel, such aircraft are instruments of interstate commerce. See, *King v. L. & L. Marine Service, Inc.*, 647 S.W.2d 524 (Mo.banc 1983).

The second finding attacked by plaintiff is the Commission's finding that apportionment is not necessary because the aircraft is permanently situated in St. Louis County and has not acquired a taxable situs in any other state.

The issue of whether property has obtained a taxable situs in another state depends on whether it is habitually employed within the state. *Braniff Airways v. Nebraska State Board,* 347 U.S. 590 (1953). An alternative situs may be established either by a showing that fixed routes or regular schedules are used or that some of the property is habitually employed in the state on a constant basis. *Central Railroad Company of Pennsylvania v. Pennsylvania,* 370 U.S. 607 (1962); *Braniff Airways, supra* (Douglas, J., concurring).

In reviewing the Commission's decision under Section 536.140 RSMo., the evidence must be viewed in its entirety with all legitimate inferences to be drawn therefrom in a light most favorable to the commission. *Hammack v. Missouri Clean Water Commission,* 659 S.W.2d 595, 597 (Mo.App. 1983). The

Court's role is limited to a determination of whether the Commission's findings are clearly contrary to the overwhelming weight of the evidence. *Bland v. City of Trenton,* 618 S.W.2d 438 (Mo.App. 1981).

The Commission's finding that plaintiff's aircraft are not habitually employed in a state other than Missouri is supported by competent and substantial evidence. Both aircraft spent approximately 75% of their ground time in St. Louis County. Aircraft N302 PC spent 4.1% of its ground time in Indiana, the state it visited most often, and made 163 trips to Indiana for an average of 13.5 trips per month. Respondent's STC Exhibit J. Based on this evidence the Commission could reasonably find that the aircraft were not habitually employed in Indiana or any other state during 1982. The Commission's conclusion that the aircraft did not have a taxable situs other than in Missouri must therefore be affirmed.

Because the Commission's conclusion that the aircraft do not have an alternative tax situs, there is no necessity for apportionment.

WHEREFORE, it is ordered, adjudged and decreed that the order of the State Tax Commission must be and therefore is affirmed.

SO ORDERED:

Jean C. Hamilton, Judge

APPENDIX D

STATE TAX COMMISSION OF MISSOURI

Appeal Number 1983-1269

Peabody Coal Company,
Complainant,

vs.

Charles Schneider, Assessor for
the County of St. Louis, Missouri,
Respondent.

DECISION AND ORDER

I. FINDINGS OF FACT

The State Tax Commission of Missouri, having considered all of the competent evidence upon the whole record, makes the following Findings of Fact:

1.1 COMPLAINANT. The Complainant in the above-numbered appeal is Peabody Coal Company, a Delaware Corporation with its principal office located in St. Louis, Missouri.

1.2 RESPONDENT. The Respondent in the above-numbered appeal is Charles Schneider, in his official capacity as assessor for the County of St. Louis, Missouri.

1.3 SUBJECT OF APPEAL. The subject property in appeal number 1983-1269 consists of two privately owned aircraft. One is a Beechcraft King Air B-200 which was manufactured in 1979 and is identified as N302 PC (Complainant's Petition). The second aircraft is a Rockwell Sabre Liner which was manufactured in 1973 and is identified as N306 PC (Complainant's Petition).

1.4 ASSESSED VALUATION BY RESPONDENT. The assessed valuation of the subject property as determined by the

Respondent and placed upon the general assessment roll for the year and as of January 1, 1983, was:

Appeal Number	Total
1983-1269	$ 288,530 (N 302 PC) $ 270,040 (N 306 PC) - (Joint Stipulation of Facts, paragraph 3)

1.5 ASSESSED VALUATION BY BOARD OF EQUALIZATION. The Complainant appealed the assessed valuation of the subject property as determined by the Respondent to the County Board of Equalization. The assessed valuation as determined by this Board of Equalization for the subject year and as of the subject tax day was:

Appeal Number	Total
1983-1269	$ 288,530 (N 302 PC) $ 208,330 (N 306 PC) (Complainant's Petition)

1.6 FILING DATE. The County of St. Louis is a first class county. The Compainant timely filed its Complaint for Review of Assessment with the Commission on August 15, 1983.

1.7 EVIDENTIARY HEARING WAIVED. The parties waived evidentiary hearing and submitted this appeal for decision based on stipulated facts and legal briefs.

1.8 STIPULATION. The parties have stipulated to the following facts:

1. The true value in money of aircraft numbers N 302 PC and N 306 PC for 1983 personal property tax purposes is $847,515 and $624,990, respectively (Joint Stipulation of Facts, paragraphs 9, 10).

2. Complainant and its affiliated corporations are engaged principally in the operation of underground

and surface coal mines throughout the United States and the provision of marketing and other support services for those coal mining operations. The subject aircraft were used exclusively in conducting the interstate business of Complainant and its affiliates (Joint Stipulation of Facts, paragraph 11).

The parties stipulated to the completeness and accuracy of various joint exhibits which included flight logs, take off and landing schedules, schedules of flight time and flight miles, and schedules of ground time of the subject aircraft (Joint Stipulation of Facts, paragraphs 12-25). The Commission finds as fact the matters as set forth in the stipulation.

1.9 ISSUES. The main issue in this case is whether the subject aircraft is subject to property taxation in St. Louis County. The collateral issues which must be considered are as follows:

1. Must taxes on these aircraft be apportioned under the Commerce Clause of the United States Constitution?

2. Must taxes on these aircraft be apportioned under the Due Process Clause of the United States Constitution?

3. May Respondent assess these aircraft even though no apportionment formula for that purpose is set forth in the Missouri statutes?

4. What apportionment formula should be applied if apportionment of taxes is deemed necessary?

1.10 COMPLAINANT'S ARGUMENT. Complainant contends that Respondent and the domiciliary state of Missouri may tax the aircraft which it contends are instrumentalities of interstate commerce, only if they have not acquired a taxable situs in any other state. Complainant maintains that these aircraft have acquired taxable situs in other states and are therefore not taxable 100 percent in Missouri. Complainant

further argues that this property may not be assessed since no apportionment formula for noncommercial aircraft is set forth in the Missouri statutes. Finally, Complainant argues that, should apportionment of taxes be appropriate, a mileage formula should be used (Complainant's Brief; Complainant's Reply Brief).

1.11 RESPONDENT'S ARGUMENTS. Respondent maintains that neither the Commerce Clause nor the Due Process Clause of the United States Constitution require apportionment of the taxes assessed for the subject aircraft since they are not commercial aircraft. Respondent contends that the Missouri statutes and constitution authorize the taxation of the subject property, whether or not taxes must be apportioned. Respondent further argues that Complainant has failed to prove that the subject property has attained taxable situs outside Missouri. Finally, should apportionment of taxes be deemed appropriate, Respondent believes that a formula based on ground time would be a better reflection of the benefits received in the various jurisdictions (Respondent's Brief).

1.12 AIRCRAFT ARE NOT INSTRUMENTALITIES OF INTERSTATE COMMERCE. The Commission finds that Complainant's privately owned aircraft are not instrumentalities of interstate commerce as that term is interpreted under the Commerce Clause of the United States Constitution (See paragraph 3.1, infra).

1.13 AIRCRAFT IS 100 PERCENT TAXABLE IN ST. LOUIS COUNTY. The Commission finds that the Due Process Clause of the United States Constitution does not require apportionment of taxes on the subject property since the property is permanently situated in St. Louis County, Missouri, and has not acquired a taxable situs elsewhere (See paragraph 3.2, infra).

1.14 MOOT ISSUES. The Commission in light of the above findings of fact, finds that the issues of (1) whether the assessor

may assess the subject property absent a statutory apportionment formula for noncommercial aircraft and (2) what the appropriate apportionment formula would be, are rendered moot (See paragraph 3.3, infra).

1.15 PUBLIC MEETING. On the 21st day of March 1985, the Commission convened in a regular public meeting to consider and rule upon the said appeal.

II. CONCLUSIONS OF LAW

The State Tax Commission of Missouri finds the law as it applies to this appeal to be as follows:

2.1 JURISDICTION. The Commission has jurisdiction to hear this appeal and to correct any assessment which is shown to be unlawful, unfair, arbitrary or capricious. Article X, Section 14, Missouri Constitution of 1945 (hereinafter by article and section only); Sections 138.430, 138.460(2), Vernon's Annotated Missouri Statutes (hereinafter by section only).

2.2 CONTESTED CASE. Appeals to the Commission from decisions of a County Board of Equalization are contested cases within the meaning of Chapter 536 of the Revised Statutes of Missouri. Sections 138.470(4), 536.010(2); In re St. Joseph Lead Co., 352 S.W.2d 656, 661 (Mo. 1961); T.J. Moss Tie Co. v. State Tax Commission, 345 S.W.2d 191, 193 (Mo. 1961); Koplar v. State Tax Commission, 321 S.W.2d 686, 693 (Mo. 1959). The taxpayer is the Complainant, and the county assessor is the Respondent. Sections 138.360(4), 138.460(2); State ex rel. Brentwood School District v. State Tax Commission, 589 S.W.2d 613, 614-615 (Mo. banc 1979); Lindell Tower Apartments, Inc. v. Guise, 357 Mo. 50, 206 S.W.2d 320, 323 (1947).

2.3 EVIDENCE UPON THE RECORD. The decision of the Commission must be based upon and only upon its examination of all testimony and records received into evidence upon the

record. Article V, Section 18; Sections 138.310(2), 138.470(1), 536.070(8), 536.140(2)(3); Koplar v. State Tax Commission, 321 S.W.2d 686, 695 (Mo. 1959). *See* Missouri Church of Scientology v. State Tax Commission, 560 S.W.2d 837, 839 (Mo. banc 1977); Bohannon v. Camden Bend Drainage District, 240 Mo. App. 492, 208 S.W.2d 794, 800 (1948).

2.4 HINDSIGHT. The Commission may consider facts and events which occurred after the subject tax day, an advantage not enjoyed by the Respondent. St. Louis County v. State Tax Commission, 515 S.W.2d 446, 453 (Mo. 1974).

2.5 DISCRIMINATION CASE. To obtain a reduction in assessed value based upon discrimination or non-uniformity, also called an improper or unfair assessment, the Complainant must prove the following elements:

(1) The Complainant has standing to appeal the subject assessment, Hertz Corporation v. State Tax Commission, 528 S.W.2d 952, 954 (Mo. banc 1975);

(2) The subject assessment was formerly appealed to the County Board of Equalization or to the County Board of Appeals, Sections 138.180, 138.430 and 138.460(2);

(3) The appeal to the Commission was made in a timely and proper manner, sections 138.110, 138.430 and 138.460(2);

(4) The true value in money of the subject property on the subject tax day, In re St. Joseph Lead Co., 352 S.W.2d 656, 662-664 (Mo. 1961); Koplar v. State Tax Commission, 321 S.W.2d 686, 690 (Mo. 1959); May Department Stores Co. v. State Tax Commission, 308 S.W.2d 748, 761 (Mo. 1958); and

(5) An intentional plan of discrimination against the subject property by assessing officials resulting in the assessment of the subject property at a greater percentage of true value than other property, generally, within the

same class within the taxing jurisdiction. *Koplar*, 321 S.W.2d at 695; *May Department Stores*, 308 S.W.2d at 762.

2.6 ELEMENTS OF EXEMPTION CASE. To obtain an exemption from assessment based upon an exemption case, sometimes called an unlawful case, the Complainant must prove the following elements:

(1) The Complainant has standing to appeal the subject assessment, Hertz Corporation v. State Tax Commission, 528 S.W.2d 952, 954 (Mo. banc 1975);

(2) The subject assessment was formerly appealed to the County Board of Equalizaiton or to the County Board of Appeals, Sections 138.180, 138.430 and 138.460(2);

(3) The appeal to the Commission was made in a timely and proper manner, Sections 138.110, 138.430 and 138.460(2); and

(4) The property is used in conformity with the statute governing exemptions. Article X, Section 6; Section 137.100; Franciscan Tertiary Province of Missouri, Inc. v. State Tax Commission, 566 S.W.2d 213, 226 (Mo. banc 1978). *See*, Barnes Hospital v. Leggett, 589 S.W.2d 241.

2.7 EXEMPTIONS. All real property and tangible personal property exempt from taxation must be enumerated in the Constitution of Missouri. Article X, Section 6.

2.8 EXEMPTIONS. Although a taxing statute is construed strictly against the state, an exemption statute is strictly construed against the one claiming the exemption. State ex rel. Union Electric Co. v. Goldberg, 578 S.W.2d 921, 923 (Mo. banc 1979); State ex rel. Dravo Corporation v. Spradling, 515 S.W.2d 512 (Mo. 1974); Tiger v. State Tax Commission, 277 S.W.2d 561, 564 (Mo. 1955); American Bridge Co. v. Smith, 352 Mo. 616, 179 S.W.2d 12, 15 (1944); Mississippi River Fuel Corporation v. Smith, 350 Mo. 1, 164 S.W.2d 370, 377 (1942);

State ex rel. Spillers v. Johnston, 214 Mo. 656, 662, 113 S.W. 1083, 1084 (1908).

2.9 TAXABILITY. Every person owning or holding tangible personal property in Missouri on January 1, of each year is liable for taxes on that property for that year. Section 137.075.

2.10 TAX DAY. Real property and tangible personal property is valued annually as of January 1 of the subject year. Article X, Section 3; Sections 137.021(3), 137.075, 137.080, 137.115(1), 137.340, 137.495; St. Louis County v. State Tax Commission, 515 S.W.2d 446, 447 (Mo. 1974); Greene County v. Hermel, Inc., 511 S.W.2d 762, 771 (Mo. 1974); Cupples-Hessee Corporation v. Bannister, 322 S.W.2d 817, 823 (Mo. 1959).

2.11 ASSESSED VALUATION. Real Property and tangible personal property must be assessed at a rate of thirty-three and one-third percent of its true value in money. Article X, Section 4(b); Section 137.115(1).

2.12 TRUE VALUE IN MONEY. True value in money is defined as the price which the subject property would bring when offered for sale by one willing but not obligated to sell it, and is bought by one willing or desirous to purchase, but who is not compelled to do so. Greene County v. Hermel, Inc., 511 S.W.2d 762, 771 (MO. 1974); M.A.I. No.16.02. True value in money is defined in terms of value in exchange, and not in terms of value in use. Stephen & Stephen Properties, Inc. v. State Tax Commission, 499 S.W.2d 798, 801-803 (MO. 1973). In sum, true value in money is the fair market value of the subject property on the valuation date. Hermel, Inc. v. State Tax Commission, 564 S.W.2d 888, 897 (Mo. banc 1978).

2.13 PRESUMPTIONS. There is a presumption of validity and of good faith of taxing officials. There is a presumption of correctness of assessments by the Assessor, by the County Board of Equalization, and by the Commission. Hermel, Inc. v. State Tax Commission, 564 S.W.2d 888, 895 (Mo. banc

1978); Chicago, Burlington & Quincy Railway Co. v. State Tax Commission, 436 S.W.2d 650, 656 (Mo. 1968); May Department Stores Co. v. State Tax Commission, 308 S.W.2d 748, 759 (Mo. 1958); Ulman v. Evans, 247 S.W.2d 693, 697-698 (Mo. 1952); State ex rel. Thompson v. Bethards, 320 Mo. 1164, 9 S.W.2d 603, 604 (banc 1928).

2.14 REBUTTABLE PRESUMPTIONS. The procedural presumptions of validity and of good faith and of correctness of the Respondent and of the County Board of Equalization are rebutted when the Complainant comes forward with substantial evidence. However, even when they are rebutted, the Complainant, as the moving party, has the burden of proof on the facts. Cupples-Hesse Corporation v. State Tax Commission, 329 S.W.2d 696, 701-702 (Mo. 1959); Koplar v. State Tax Commission, 321 S.W.2d 686, 693 (Mo. 1959); Michler v. Krey Packing Co., 363 Mo. 707, 253 S.W.2d 136, 140 (Mo. 1952). A taxpayer does not meet his burden if evidence on any essential element of his case leaves the Commission " 'in the nebulous twilight of speculation, conjecture and surmise.' " *See,* Rossman v. G.F.C. Corp. of Missouri, 596 S.W.2d 469, 472 (Mo. App. 1980).

2.15 SUBSTANTIAL EVIDENCE. Substantial evidence is that evidence which, if true, has probative force upon the issues, i.e., evidence favoring facts which are such that reasonable men may differ as to whether it establishes them, and from which the Commission can reasonably decide an appeal on the factual issues. Cupples-Hesse Corporation v. State Tax Commission, 329 S.W.2d 696, 702 (Mo. 1959); Collins v. Division of Welfare, 270 S.W.2d 817, 820 (Mo. banc 1954).

2.16 DUE INVESTIGATION. The Commission is presumed to have made a due investigation, and thereby to have obtained sufficient data upon which to base its Decision and Order. Xerox Corporporation v. State Tax Commission, 529 S.W.2d 413, 417 (Mo. banc 1975); City of St. Louis v. State Tax Com-

mission, 505 S.W.2d 75, 81 (Mo. 1974); St. Louis Electric Bridge Co. v. Kolen, 315 Mo. 424, 287 S.W. 427, 429 (1926).

2.17 COMMERCE CLAUSE. The Commerce Clause provides constitutional immunity from the imposition of direct burdens on interstate commerce. Miller v. Greenville, 138 F.2d 712, 718 (CA8 Ark, 1943). It does not immunize instrumentalities of interstate commerce from all state taxation provided the tax does not discriminate against such commerce. Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590, 74, S.Ct. 757, 762 (1954).

2.18 COMMERCE. The term "commerce" includes transportation for others as an independent business and the instrumentalities used therefore. 15A AM JUR 2d COMMERCE §73; Hanley v. Kansas City Southern Railway Co., 187 U.S. 617, 23 S.Ct. 214, 215 (1902). Congress has exclusive power to regulate instrumentalities of interstate commerce. Gloucester Ferry Co. v. Commonwealth of Pennsylvania, 114 U.S. 196, 5 S.Ct. 826, 828 (1885).

2.19 INSTRUMENTALITIES OF INTERSTATE COMMERCE. If property is used as an instrumentality of interstate commerce and has acquired a tax situs in another state or states, the domiciliary state may not levy a property tax on the full value of the property. Ott v. Mississippi Valley Barge Line Company, 336 U.S. 169, 69 S.Ct. 432 (1949); Standard Oil Company v. Peck, 342 U.S. 389, 72 S.Ct. 309 (1952). For a nondomiciliary state to tax personal property that property must be habitually employed within the state. Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment, supra at 764.

2.20 DUE PROCESS. If a tax has relationship to opportunities, benefits or protection conferred by taxing state it satisfies due process. Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment, supra at 762. The taxable situs of personal property is where it is more or less per-

manently located. Buchanan County v. State Tax Commission, 407 S.W.2d 910, 914 (Mo. 1966); COOLEY, TAXATION §451 (4th ed. 1924). If property is "permanently" located outside the taxing state, the taxation of it would violate the due process clause of the United States Constitution. COOLEY, TAXATION §451 (4th ed. 1924). The state of origin remains the permanent situs of personal property not withstanding occasional excursions without the state. Northwest Airlines, Inc. v. State of Minnesota, 322 U.S. 292, 64 S.Ct. 950, 954 (1944); Miller v. Greenville, 138 F.2d 712 (CA8 Ark., 1943); New York Central & Hudson River Railroad Company v. Miller, 202 U.S. 584, 26 S.Ct. 714, 717 (1906); COOLEY, TAXATION §452 (4th ed., 1924).

2.21 TAXATION OF CORPORATE PERSONAL PROPERTY. Section 137.095, which deals with the taxation of corporate tangible personal property reads in pertinent part:

> The real and tangible personal property of all corporations operating in any county in the state of Missouri...and subject to assessment by county...assessors, shall be taxed in the county in which the property is situated on the first day of January of the year for which the taxes are assessed...§137.095.1 RSMo 1978.

It has been held that the word "situated" in the above-cited statute refers to the place where the personal property is regularly kept with a more or less permanent location. Buchanan County v. State Tax Commission, supra at 914.

2.22 ASSESSOR. The assessor must adjust the tax book according to the Orders of the Commission. The assessor must make a supplemental tax book for the subject year if necessary. Article VI, Section 18(b); Sections 137.235, 137.300, 138.060(2), 138.080, 138.400(3), 138.470(1)(2); Section 4.360, St. Louis County Charter of 1979.

III. DECISIONS

The State Tax Commission of Missouri, being fully advised in the matters and upon full consideration thereof, makes the following decisions in this appeal:

3.1 COMMERCE CLAUSE DOES NOT REQUIRE APPORTIONMENT. Complainant maintains that the taxes on the subject aircraft must be apportioned under the Commerce Clause of the United States Constitution. The Commerce Clause will affect the local taxation of personal property only if the taxation of that property somehow directly burdens interstate commerce. Miller v. Greenville, 138 F.2d 712 (CA8 Ark., 1943); Pullman Co. v. Richardson, 261 U.S. 330, 43 S.Ct. 366, (1923). It is for this reason that commercial carriers have been considered to be instrumentalities of interstate commerce and are regulated under the commerce clause 15A AM JUR 2d Commerce §73; Gloucester Ferry Co. v. Commonwealth of Pennsylvannia, 114 U.S. 196, 5 S.Ct. 826 (1885). The very act of transporting persons or goods between states for hire is by definition commerce between states or interstate commerce. An attempt by local governments to tax instrumentalities engaged in interstate commerce may put a burden on such commerce and is therefore limited by the Commerce Clause.

Privately owned transportation property has never been held to be an instrumentality of interstate commerce for ad valorem tax purposes. Mikos v. Ringling Brothers-Barnum & Bailey Combined Shows, Inc. 368 So. 2d 884, 890 n.5 (Fla App. 1979) rehearing denied 1979; but see King v. L & L Marine Service Inc. 647 S.W.2d 524 (Mo. banc 1983) dealing with sales and use tax. Complainant argues that it uses its planes in interstate commerce. However the planes themselves are not commercial vehicles and are not, in and of themselves, instruments of interstate commerce (See paragraph 1.12, supra). The taxation of the subject aircraft by Missouri will in no way affect the interstate commerce of Complainant. These aircraft are used as a

means of transport only, Complainant's "commerce" activities take place at points at either end of the plane's trips. Its interstate commerce is conducted regardless of mode of transportation.

The Commission finds that since the taxation of Complainant's personal property by Missouri in no way burdens interstate commerce, the taxation of such property is not required to be apportioned under the Commerce Clause of the United States Constitution.

3.2 DUE PROCESS CLAUSE DOES NOT REQUIRE APPORTIONMENT. If a tax in practical operation has relation to the opportunities, benefits, or protection provided by the taxing state, due process is satisfied. Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590, 74 S.Ct. 757, 763 (1954). It is a presumed that the domiciliary state, as the state of origin and the one state that undoubtedly provides benefits, opportunities, and protection to the personal property, may tax the whole of the property.

The subject aircraft are hangared and serviced in St. Louis County. (See Joint Exhibits 1-A and 2-B, flight logs of aircraft). The aircraft arrive and depart from St. Louis County. (See Joint Exhibits 3-C and 4-D, schedules of takes offs and landings of the aircraft). Aircraft number N-302 PC spent 73.7 percent of its ground time in St. Louis County in 1982, and aircraft number N-306 PC spent 75.1 percent of its ground time in St Louis County in 1982. (See Respondent's Exhibit I, ground time of aircraft in St. Louis County). The evidence clearly indicates that the subject aircraft are regularly kept in St. Louis County which is its more or less permanent location. Buchanan County v. State Tax Commission, 407 S.W.2d, 910, 914 (Mo. 1966).

Complainant has submitted evidence showing that the subject aircraft make frequent flights to other states. However, the state of origin remains the permanent situs of the subject pro-

perty notwithstanding its occasional excursions outside the state. New York Central & Hudson River Railroad Company v. Miller, supra at 717; Northwest Airlines, Inc. v. State of Minnesota, supra at 954. In order to establish a permanent situs outside Missouri, Complainant's must show that the subject property is habitually employed in another state. The courts define the phrase "habitually employed" to mean the use in a state to such an extent that some portion of the subject property has some contact with the state at all times, such as 18 daily arrivals and departures of aircraft in the *Braniff* case, or having a substantial number of railroad cars in a state throughout the year in the case of Central Railroad Company v. Commonwealth of Pennsylvania, 370 U.S. 607, 82 S.Ct. 1297 (1962), rehearing denied, 371 U.S. 856, 83 S.Ct. 15 (1962). Complainant's planes were never in any other state with sufficient regularity as to have acquired a taxable situs outside of Missouri under the Due Process Clause. Missouri is the only state with sufficient contacts to constitutionally tax the subject aircraft.

The Commission finds that since the subject aircraft are not subject to taxation under the Due Process Clause in any other state but Missouri, the assessments by St. Louis County, on the subject property, need not be apportioned under the Due Process Clause of the United States Constitution. (See paragraph 1.13, supra).

3.3 REMAINING ISSUES MOOT. Since the Commission has found that the taxes on the subject property need not be apportioned under the Commerce Clause of the United States Constitution nor under the Due Process Clause of the United States Constitution, the remaining issues of whether Respondent may lawfully tax the subject property in the absence of a statutory apportionment formula or what apportionment formula should be used, need not be considered and are hereby adjudged moot. (See paragraph 1.14, supra).

3.4 ASSESSMENT AFFIRMED. The Commission finds that the subject property has been correctly assessed by the

Board of Equalization for January 1, 1983. The assessment will be affirmed.

IV. ORDER

Based upon the aforegoing, it is hereby ORDERED, ADJUDGED AND DECREED by the State Tax Commission of Missouri as follows:

4.1 BOARD OF EQUALIZATION AFFIRMED. The assessed valuation for the subject property as determined by the County Board of Equalization for the subject tax day shall be, and is hereby AFFIRMED.

4.2 DISBURSAL OF TAXES. The Collector of St. Louis County shall disburse the protested taxes presently in an escrow account in accord with the decision on the underlying assessment in this appeal. However, if any or all protested taxes have been disbursed pursuant to §139.031.8, RSMo Cum. Supp. 1983, the parties, or one of them, shall apply to the circuit court having jurisdiction of the cause for disposition of the protested taxes held by either the collector or the taxing authority.

4.3 PARAGRAPH HEADINGS. The paragraph headings contained in this Decision and Order are used only to facilitate reference, and in no way define or limit the scope or intent of any of the provisions of this Decision and Order.

4.4 FORMAT. Any Finding of Fact which is a Conclusion of Law or Decision shall be so deemed. Any Decision which is a Finding of Fact or Conclusion of Law shall be so deemed.

4.5 CERTIFIED COPY. The Administrative Secretary of the Commission shall serve a certified copy of this Decision and Order upon each party to this appeal.

4.6 EFFECTIVE DATE. This Decision and Order shall become effective on the 25th day of March, 1985.

STATE TAX COMMISSION OF MISSOURI

_____

Chairman

/s/ Van E. Donley
Commissioner

/s/ Robert E. Coleman
Commissioner

Dated at Jefferson City,
Missouri, on this 21st day
of March, 1985.

APPENDIX E

IN THE SUPREME COURT OF THE
STATE OF MISSOURI

Peabody Coal Company,
Appellant,

v.

The State Tax Commission of Missouri,
Charles Schneider, and George Leachman,
Appellees.

No. 68858

Filed September 3, 1987

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Peabody Coal Company hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Missouri entered in this action on June 16, 1987.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

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Supreme Court, U.S.
FILED
NOV 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PEABODY COAL COMPANY,
Appellant,

VS.

THE STATE TAX COMMISSION OF MISSOURI,
CHARLES SCHNEIDER, and GEORGE LEACHMAN,
Appellees.

On Appeal From the Supreme Court of Missouri

APPELLEES' MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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INDEX

	Page
Motion to Dismiss or in the Alternative to Affirm	1
Statement	1
Brief in Support of Appellees' Motion	5
I. Lack of Appellate Jurisdiction	5
II. Lack of Substantial Federal Question	6
III. Other Grounds for Dismissal	8
IV. Affirmance of Lower Court Decision	8
Conclusion	9

TABLE OF AUTHORITIES

	Page
Cases:	
Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590 (1954).	7
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	9
Northwest Airlines v. Minnesota, 322 U.S. 292 (1944)	7
Peabody Coal Co. v. State Tax Commission, 731 S.W.2d 837 (Mo. banc 1987)	5,6
Rescue Army v. Municipal Court, 331 U.S. 549 (1947)	8
Warth v. Seldin, 422 U.S. 490 (1975)	8
Other Authorities:	
28 U.S.C. §1257(2)	1,5
28 U.S.C. §1257(3)	5
28 U.S.C. §2103	5
Mo. Rev. Stat. §137.075 (1986)	5
Mo. Rev. Stat. §137.095 (1986)	5

No. 87-588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PEABODY COAL COMPANY,
Appellant,

vs.

THE STATE TAX COMMISSION OF MISSOURI,
CHARLES SCHNEIDER, and GEORGE LEACHMAN,
Appellees.

On Appeal From the Supreme Court of Missouri

APPELLEES' MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

MOTION OF APPELLEES

Appellees move this Court to dismiss Appellant's appeal for want of jurisdiction in this Court, or, in the alternative, to affirm the decision of the Supreme Court of Missouri en banc entered on June 16, 1987, from which the Appellant has taken an appeal pursuant to 28 U.S.C. §1257(2).

STATEMENT

Appellee Charles Schneider, Assessor for St. Louis County and Appellant Peabody Coal Company submitted this matter to the Appellee State Tax Commission of Missouri upon a Joint Stipulation of Facts.

Peabody, whose principal office is located in the City of St. Louis, filed its 1983 St. Louis County personal property declaration on February 28, 1983. The declaration included two aircraft owned or controlled by Peabody on January 1, 1983. The aircraft - - N 306 PC (a Rockwell Sabreliner) and N 302 PC (a Beechcraft King Air) - - are hangared in St. Louis County when they are in the St. Louis area.

By letter dated May 9, 1983, Appellee Assessor determined that the entire values of the aircraft were taxable in St. Louis County.

In response to a timely appeal of the assessment, the Board of Equalization of St. Louis County held a hearing and subsequently reduced the assessed valuation of N 306 PC. Peabody filed a timely appeal of the Board's decision to the State Tax Commission. On December 29, 1983, Peabody paid under protest the entire personal property tax billed to it with respect to the aircraft to the Appellee Collector of Revenue of St. Louis County.

Peabody and affiliated corporations are engaged principally in the operation of underground and surface coal mines throughout the United States, and the provision of marketing and other support services for those coal mining operations. Aircraft N 302 PC was and is, and N 306 PC was, until its sale in April 1983, used exclusively in conducting the interstate business of Peabody and its affiliates. The aircraft are not used in the commercial conveyance of passengers or cargo for hire. No revenue is derived directly from the operations of these aircraft. Peabody has not asserted any claims that the aircraft are maintained or serviced outside St. Louis County, or that hangar space is rented elsewhere.

In its appeal to the Supreme Court of Missouri, Peabody limited its claim for additional tax situs to Indiana, the state most often visited by its aircraft. According to stipulated flight logs, N 302 PC spent 73.7% of the time in 1982 in St. Louis

County. In 1982, N 302 PC made trips to nineteen states. Fourteen of these states were visited fewer than ten times all year. Only five states were visited on an average of at least once per month. Aircraft N 302 PC spent only 4.1% of the time in 1982 on the ground in Indiana, the state it visited most frequently.

Aircraft N 306 PC spent 75.1% of the time in 1982 in St. Louis County. This time ranged from a low of 60.1% of the hours in March, to a high of 94.3% of the hours in July. In eight months, N 306 PC was in St. Louis County more than 77% of the time. In 1982, N 306 PC made trips to twenty-eight states and Washington, D.C. Twenty-three states were visited less than once per month. Only one state, Indiana, was visited on an average of at least twice per month. Aircraft N 306 PC spent only 1.4% of the time in 1982 on the ground in Indiana, the state it visited most frequently. In five of those months, N 306 PC was in Indiana 0.5% or less of the time.

Aircraft N 306 PC was on the ground in West Virginia only 1.6% of the hours in 1982, when it made twenty trips to seven cities. In four months N 306 PC was never present in West Virginia; it made one trip in each of three other months. Aircraft N 306 PC was on the ground in Florida for 3.4% of the time in 1982, when it completed twelve trips to eight cities. In seven months, N 306 PC never entered Florida, while it made only one trip in each of two other months.

Aircraft N 306 PC was on the ground in Arizona for 1.8% of the time in 1982, when it made twelve trips to two cities. Aircraft N 306 PC was never present in Arizona during five months, and it made only one visit in each of three months.

Aircraft N 306 PC spent only 2.4% of the time in 1982 on the ground at National Airport in Washington, D.C., where it made ten trips. In four months, N 306 PC was never present in Washington, D.C., while it made only one trip in each of six additional months.

Peabody's aircraft maintained a habitual and regular presence in St. Louis County. Contacts with other states were irregular, infrequent, and for only brief periods of time.

The State Tax Commission of Missouri found that (1) the Commerce Clause of the United States Constitution does not require apportionment because the ad valorem taxation of the aircraft in Missouri did not impermissibly burden interstate commerce; and (2) the Due Process Clause does not require apportionment because the aircraft were permanently situated in St. Louis County and had not acquired a taxable situs in any other state.

Peabody appealed the State Tax Commission's decision to the Circuit Court of the City of St. Louis. The circuit court affirmed the order of the Commission, but rejected the Commission's finding that the aircraft were not instruments of interstate commerce. However, the court affirmed the Commission's findings that the aircraft were permantently situated in St. Louis County, did not acquire a tax situs in any state other than Missouri, and could be taxed in St. Louis County without apportionment. The court held that the Commission's finding was supported by competent and substantial evidence.

Dissatisfied with the circuit court's judgment affirming the ultimate holdings of the State Tax Commission, Peabody perfected an appeal to the Supreme Court of Missouri.

The Supreme Court of Missouri en banc affirmed the decision of the circuit court, concluding that on the basis of the stipulated facts, taxing authorities could properly find that the aircraft were permanently situated in St. Louis County so as to be subject to ad valorem taxation without apportionment. The court found that Peabody's aircraft did not have contacts with any other state sufficient to establish an alternative tax situs. The court also held that ad valorem taxation of Peabody's aircraft did not burden the corporation's unrelated interstate commerce.

BRIEF IN SUPPORT OF APPELLEES' MOTION

I. This Court Lacks Appellate Jurisdiction

This Court is without appellate jurisdiction pursuant to 28 U.S.C. §1257(2) because the Supreme Court of Missouri did not uphold a state statute against a claim that it is repugnant to the Constitution of the United States. The Supreme Court of Missouri did not directly pass upon the constitutionality of §§137.075 or 137.095 of the Missouri Revised Statutes of 1986; the case turned on the court's findings of fact. Peabody has not only not challenged the validity of either statute, it has not claimed that either statute is invalid as applied to its particular situation. The decision of the Supreme Court of Missouri rested on Peabody's failure to establish facts sufficient to support findings that an unapportioned tax burdened Peabody's interstate commerce or that the aircraft had acquired a tax situs in any state other than Missouri. *Peabody Coal Company v. State Tax Commission,* 731 S.W.2d 837 (Mo. banc 1987).

The appellate jurisdiction of this Court does not extend to an action of this nature; the decision of the Supreme Court of Missouri is reviewable, if at all, only by writ of certiorari. 28 U.S.C. §1257(3). Accordingly, the appeal should be dismissed, and, treating the jurisdictional statement as an application for a writ of certiorari, the writ should be denied. 28 U.S.C. §2103.

The writ should be denied because the decision of the Supreme Court of Missouri is obviously correct and involves no conflict of opinion or other basis for review by this Court. Review would require the resolution of questions of fact decided adversely to Peabody in the state courts. Furthermore, the stipulated facts are peculiar to this case and are not likely to recur in other cases.

II. This Case Does Not Present a Substantial Federal Question

Should this Court find that an appeal is the proper mode of review for this case, it should nevertheless dismiss the appeal because this case does not involve a substantial federal question.

Ad valorem taxes are imposed on the article taxed; the burden is on mere ownership. Ad valorem taxation of non-commercial aircraft is not a burden on the interstate commerce of owner corporations, and has never been held to be violative of the Commerce Clause. The Supreme Court of Missouri held that ad valorem taxation of Peabody's aircraft does not burden the interstate commerce of Peabody's unrelated business. *Peabody* at 838-39. Peabody has not attempted to challenge this finding in its Jurisdictional Statement.

Peabody appears to argue in its Jurisdictional Statement that there is a substantial federal question because many corporations operate their own private aircraft. However, Peabody has failed to articulate a substantial federal question because, in fact, there is none.

Peabody urges that a decision of this Court is necessary to resolve uncertainty for businesses that utilize private aircraft. There is no uncertainty. Private corporate aircraft are taxed, if at all, by the domiciliary state.

All the case law cited by Peabody in its Jurisdictional Statement pertains to the personal property of common carriers, where such property is used to carry passengers or cargo for hire. Despite the existence of thousands of corporately owned, non-commercial aircraft in this country, Peabody has failed to find any law to show that such aircraft are or should be held to have acquired a tax situs in nondomiciliary states visited on business unrelated to their operation as aircraft. A logical extension of a personal property tax apportionment requirement on aircraft not used as commercial carriers would be that per-

sonal property taxes on corporate automobiles also should be apportioned among states where irregular and/or infrequent trips are made. Apportionment requirements for non-commercial aircraft would result in astronomical administrative burdens for both owners and governments.

Even if this Court were to accept Peabody's view that its situation is analogous to the operation of commercial carriers' aircraft, the decision in *Northwest Airlines v. Minnesota,* 322 U.S. 292 (1944) is dispositive of the facts in this case. This Court's opinion in *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment,* 347 U.S. 590 (1954) merely delineated a fact situation in which the taxpayer could make the required showing of multiple taxing authorities. In *Northwest,* this Court allowed unapportioned ad valorem taxation by the domiciliary state where a taxpayer could not demonstrate that the property had acquired a tax situs in another jurisdiction. *Northwest* at 295-96. The only question involved here is one of fact, the same question that was presented in *Northwest:* whether Peabody's aircraft had contacts with a state other than Missouri sufficient to establish an alternate tax situs. The answer is no. Peabody has simply failed to meet this burden of proof. *Northwest* is the controlling case.

Peabody has not established that it maintained a habitual presence, rented ground space, picked up or delivered cargo or passengers for hire, had its planes maintained or otherwise serviced, or earned revenue directly from the operation of the aircraft in Indiana or any other state. The courts in the cases cited by Peabody in its Jurisdictional Statement relied on these factors to find that commercial carriers had acquired tax situses in nondomiciliary states. Peabody is merely attempting to find a creative means to avoid a lawful tax imposed in Missouri, the state where its aircraft are situated.

III. Other Grounds for Dismissal

This Court should dismiss Peabody's appeal because the constitutional issues are not ripe. Peabody is in no danger of immediate harm. Peabody further lacks standing to appeal because it has not suffered any injury in fact. There is no personal harm that a decision by this Court in Peabody's favor would eliminate. *Warth v. Seldin,* 422 U.S. 490 (1975).

While the cases do state that nondomiciliary states need not actually try to impose a tax but merely have the constitutional power to do so, the jurisdiction of this Court requires that appellant suffer some threat of immediate injury. *Rescue Army v. Municipal Court,* 331 U.S. 549 (1947). On argument before the Supreme Court of Missouri, Peabody admitted that Indiana, the only state where it is claiming to have an additional tax situs, did not even have a statute that would have permitted the imposition of an ad valorem personal property tax in 1983. Under the facts of this case, Peabody is not in any immediate danger of suffering a multiple tax burden: no state other than Missouri, the domiciliary, had authority to levy an ad valorem tax in 1983. Until such time as a second state seeks to impose a multiple tax burden, there is no need for this Court to address the question of the necessity for apportionment of ad valorem taxes on private corporate aircraft.

IV. If This Court Finds Jurisdiction It Should Affirm The Decision Of The Supreme Court of Missouri

In the alternative to their motion to dismiss, Appellees have moved this Court to affirm the decision of the Supreme Court of Missouri en banc of June 16, 1987, on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument and the decision is clearly correct.

The decision of the Supreme Court of Missouri rests on factual findings, which this Court customarily accepts in the

absence of exceptional circumstances. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). There are no exceptional circumstances here. The State Tax Commission of Missouri, the Circuit Court of St. Louis, and the Supreme Court of Missouri all found that Peabody failed to establish facts sufficient to prove that its aircraft acquired a tax situs in another state. Not one of these bodies found that unapportioned ad valorem taxation of Peabody's aircraft impermissibly burdened Peabody's commerce. In fact, Peabody has abandoned any claim that Missouri's unapportioned ad valorem tax on its aircraft constitutes an impermissible burden in violation of the Commerce Clause of the United States Constitution.

CONCLUSION

For the foregoing reasons, appellant's Appeal should be dismissed for want of jurisdiction in this Court, or, in the alternative, the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Brief in Opposition to Appellee's Motion to Dismiss or Affirm	1
I. Supreme Court Jurisdiction to Hear Appeal	1
A. Appellate Jurisdiction Under 28 U.S.C. § 1257(2) — Obligatory Jurisdiction	1
B. Alternative Appellate Jurisdiction Under 28 U.S.C. § 1257(3) — Discretionary Jurisdiction	2
II. Case or Controversy	3
A. Ripeness	3
B. Standing	4
III. Substantiality of Question Presented	4
Conclusion	7

TABLE OF AUTHORITIES

Page

Cases:

Addington v. Texas, 441 U.S. 418 (1979) 3

American Oil Co. v. Neill, 380 U.S. 451 (1965) 2

Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590 (1954). 5,6

Central Railroad Co. v. Pennsylvania, 370 U.S. 607 (1962) 3,4

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) 2

Director of Revenue v. Superior Aircraft Leasing Co., Inc., 734 S.W.2d 504 (Mo. banc 1987) 5

Fiske v. Kansas, 274 U.S. 380 (1927) 2

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 2

Northwest Airlines v. Minnesota, 322 U.S. 292 (1944) .. 5

Peabody Coal Co. v. State Tax Comm'n, 731 S.W.2d 837 (Mo. banc 1987) 3,4

Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965) 2

Other Authorities:

U.S. Const. amend. XIV, § 1 ..... *passim*

28 U.S.C. § 1257(2) 1,2

28 U.S.C. § 1257(3) 2,3

28 U.S.C. § 2103 2,3

Mo. Rev. Stat. § 137.075 (1986) ..... *passim*

Mo. Rev. Stat. § 137.095 (1986) ..... *passim*

Developments in the Law — Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953 (1962) 6

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I. SUPREME COURT JURISDICTION TO HEAR APPEAL

A. Appellate Jurisdiction Under 28 U.S.C. § 1257(2) — Obligatory Jurisdiction

The Court has appellate jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1257(2). The appeal "draw[s] in question the validity of a [Missouri] statute . . . on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the [Missouri Supreme Court] decision is in favor of its validity." 28 U.S.C. § 1257(2). At all levels below, Peabody explicitly challenged the taxation of its aircraft under Mo. Rev. Stat. §§ 137.075 and 137.095 on a non-apportioned basis, as in

violation of the Due Process Clause of the United States Constitution. The Missouri Supreme Court enforced §§ 137.075 and 137.095 as taxing the full value of Peabody's aircraft on an unapportioned basis, against Peabody's insistence that if so applied, the statutes were void under the United States Constitution. The Missouri Supreme Court ruling necessarily affirmed the validity of the statute as applied, and therefore, its judgment is appealable to this Court under 28 U.S.C. 1257(2). *See e.g., Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 440-41 (1979); *American Oil Co. v. Neill,* 380 U.S. 451, 455 (1965); *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 686 (1965); *Fiske v. Kansas,* 274 U.S. 380, 385 (1927); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 288-89 (1927).

Appellee's assertion that the decision below was based upon the resolution of questions of fact is incorrect. No facts were "resolved" by any of the administrative agencies or courts below. The case was submitted at all levels below upon a Joint Stipulation of Facts. This appeal presents the purely legal question of the standard to be applied in determining whether corporate aircraft acquire a tax situs in a non-domiciliary state so as to be subject to ad valorem taxation. Peabody has explicitly challenged the validity of §§ 137.075 and 137.095 as applied to the taxation of its aircraft on a non-apportioned basis. The Court's appellate jurisdiction to hear this appeal, therefore, rests upon 28 U.S.C. § 1257(2).

B. Alternative Appellate Jurisdiction Under 28 U.S.C. § 1257(3) — Discretionary Jurisdiction

In the event this Court determines that Peabody's appeal is improvident under § 1257(2), Peabody requests the Court to treat its Jurisdictional Statement as a Petition for a Writ of Certiorari and to review its appeal under § 1257(3).

Title 28, United States Code § 2103 provides that an improvidently taken appeal shall not be grounds for dismissal in a

case where the proper mode of review is by Petition for a Writ of Certiorari. 28 U.S.C. § 2103 (1986). The Court should treat the Jurisdictional Statement as a Petition for a Writ of Certiorari and act accordingly. *See Addington v. Texas*, 441 U.S. 418, 422-23 (1979). This Court should note probable jurisdiction, or in the alternative, grant certiorari and review the issue presented on the merits.

II. CASE OR CONTROVERSY

A. Ripeness

The Appellees' assertion that the constitutional issues in this case are not ripe for adjudication is wholly without merit. Peabody has been injured by the unconstitutional taxation of its aircraft on an unapportioned basis.

Missouri may impose a constitutional personal property tax on Peabody's aircraft without apportionment *only* if the property has not acquired a tax situs in another state. *Central Railroad Co. v. Pennsylvania*, 370 U.S. 607 (1962). This Court has never required a showing that personal property taxes are *actually* imposed on the property in another state to challenge the collection of a tax that should be apportioned. For example, in *Central Railroad*, the Court said:

> Since the domicilary State is precluded from imposing an ad valorum tax on any property to the extent that it *could* be taxed by another State, not merely on such property as *is* subject to tax elsewhere, the validity of Pennsylvania's tax must be determined by considering whether the facts in the record disclose a possible tax situs in some other jurisdiction.

Id. at 614 (emphasis in original). Even the court below rejected Appellees' contention, stating that "it makes no difference whether any other state has tried to subject the aircraft to ad valorum taxation . . . . The existence in another state of the constitutional authority to do so is enough to preclude Missouri from levying the unapportioned ad valorum tax." *Peabody*

Coal Co. v. State Tax Comm'n, 731 S.W.2d 837, 838 (Mo. banc 1987); App. A. to Jurisdictional Statement at A-3.

B. Standing

For the same reason, Appellees' argument that Peabody lacks standing to appeal because it has not suffered any injury in fact is frivolous. Peabody has paid a tax under Mo. Rev. Stat. §§ 137.075 and 137.095 which it claims is unconstitutional because the property has acquired a tax situs in Indiana, as well as Missouri, and therefore, is required by the Due Process Clause to be apportioned. It makes no difference whether Indiana has tried to subject the aircraft to ad valorum taxation. An unapportioned personal property tax is unconstitutional whenever another state *could possibly* assert jurisdiction to tax. *Central Railroad,* 370 U.S. at 614.

Accordingly, Peabody has suffered an injury in fact and has standing to bring this appeal.

III. SUBSTANTIALITY OF QUESTION PRESENTED

The substantial federal question presented by this appeal is whether business aircraft used as instrumentalities of interstate commerce should be subject to the same requirement of apportionment for personal property taxation as commercial aircraft owned and operated by regularly scheduled common carriers. Appellees argue that there is no uncertainty for interstate businesses who operate their own private aircraft. However, businesses that desire to obtain and operate or continue to operate their own aircraft are placed in an unreasonable position of having to establish a fixed daily schedule or subject themselves to the risk of inconsistent or multiple taxation. This uncertainty presents a significant obstacle to businesses that are attempting to decrease their reliance on inconvenient and unreliable commercial airlines.

Moreover, Appellees' assertion that private corporate aircraft are always "taxed, if at all, by the domiciliary state" is simply

untrue. Appellees' Brief at 6. For example, in a decision handed down after this case, the Missouri Supreme Court held that Missouri could levy a use tax on private corporate aircraft as a non-domiciliary state based upon the aircraft having made five landings in the state during the taxable period and having spent less than 7% of its ground time in Missouri. *Director of Revenue v. Superior Aircraft Leasing Co., Inc.*, 734 S.W.2d 504, 507, 508 n. 1 (Mo. banc 1987). These apparently contradictory decisions by the same court have created substantial uncertainty because it now appears that making five landings in Missouri is sufficient to create a tax situs in that non-domiciliary state, but making 225 landings in Indiana is insufficient to create a tax situs in that non-domiciliary state. Clearly, the situation demands guidance from this Court to give coherence and consistency to the rules applicable to aircraft operated in interstate commerce by businesses which are not common carriers.

Contrary to Appellees' assertion, this Court's ruling in *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954), clearly limits the application of *Northwest Airlines v. Minnesota*, 322 U.S. 292 (1944). While the *Braniff* court did not expressly overrule *Northwest*, it interpreted the holding of *Northwest* to be merely that the taxpayer failed to prove a tax situs in a non-domiciliary state. *Id.* at 602. In *Braniff*, on the other hand, the Court addressed the proof necessary to show that a non-domiciliary forum could tax aircraft employed in interstate commerce. It held that aircraft were "habitually employed" within the non-domiciliary state because of proof of the number and proportion of landings in the state to all landings of the fleet. *Braniff*, 347 U.S. at 600-601. The application of the *Braniff* standard to the taxation of aircraft operated in interstate commerce by a business which is not a common carrier, however, is the issue that has yet to be determined by this Court.

Braniff nowhere purports to be restricted to common carriers or to operators of aircraft on fixed, regular routes. The basis

upon which the *Braniff* court held that a non-domiciliary state could tax certain aircraft was their contacts with the state as evidenced by the number and proportion of landings in the non-domiciliary state compared to their total landings in all states. *Braniff,* 347 U.S. at 600-601. There was no requirement that an aircraft be operated by a regularly scheduled common carrier or be operated by a carrier who rents ground space, picks up or delivers cargo or passengers for hire, has its planes maintained or otherwise serviced, or earns revenue directy from the operation of the aircraft in the state. *Braniff* held that due process is satisfied if the aircraft are habitually employed within the state as evidenced by the *number and proportion of landings in the state. Id.*

There is no logical reason for applying a different standard to the taxation of aircraft operated by a business which is not a common carrier than to aircraft operated by a common carrier. All of this Court's opinions on the apportionment of taxes turn upon the nature and extent of the property's contacts with the non-domiciliary state — not upon the nature and character of the taxpayer who owns the property. Accordingly, any aircraft operating in interstate commerce acquires a non-domiciliary tax situs "if their operations entail something more than sporadic and casual entries into the state." *See Developments in the Law — Federal Limitations on State Taxation of Interstate Business,* 75 Harv. L. Rev. 953, 984 (1962).

CONCLUSION

For the foregoing reasons, Appellant Peabody Coal Company respectfully requests the Court to deny Appellees' Motion to Dismiss or Affirm and to note probable jurisdiction of this appeal.

Respectfully submitted,

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